IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1787 of 2002
with
CIVIL APPLICATIONS No.6301, 6556 and 8562 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS Sd/-
and
Hon'ble MR.JUSTICE D.H.WAGHELA Sd-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

NIRMA LTD
Versus
LURGI ENERGIE UND ENTSORGUNG GMBH & OTHERS

Appearance:
1. First Appeal No. 1787 of 2002
MR DUSHYANT A. DAVE with MR RAKESH GUPTA and MR K.M.THAKKER for M/S TRIVEDI & GUPTA for Appellant.
MR JP SEN and MR ROBIN JAISANGHANI with MR JAL SOLI UNWALA and MR RS SANJANWALLA for Respondents.

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE D.H.WAGHELA

Date of decision: 19/12/2002

C.A.V. JUDGEMENT

(Per : MR.JUSTICE D.H.WAGHELA)

1. This appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (for short 'the Act') read with Section 96 of the Code of Civil Procedure is preferred from the judgment and order of the learned District Judge, Bhavnagar in Civil Miscellaneous Application No.46 of 2002 filed by the appellant herein for setting aside the "First Partial Award" dated 8.4.2002 of the International Court of Arbitration of the International Chamber of Commerce (ICC) in ICC Arbitration Case No.11396/TE between the appellant and the respondent No.1 herein. The other respondents herein are the members of the Arbitral Tribunal. For the sake of convenience, the appellant (original petitioner) is described hereinafter as "NIRMA" and the respondent No.1 is described as "LURGI". The impugned judgment rejecting the prayer to set aside the award held the application therefor to be not maintainable on the ground that the impugned arbitral award only refuses to accept the plea of jurisdiction raised by NIRMA and such decision of the arbitral tribunal could not be said to be an interim or partial award for the purpose of Section 34 of the Act.

2. The relevant facts, in brief, are that, on 1.9.1997, NIRMA entered into "Know-how and Supervision Agreement" with LURGI (Lentjes Energitechnik GmbH of Germany) which, inter alia, contained the clauses as under:

"Article XV: ARBITRATION:

15.1 If, at any time any question/dispute or difference whatsoever shall arise between LENTJES and NIRMA out of or in connection with this Agreement, the same shall be finally settled by arbitration in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC). The place of arbitration shall be London and arbitration proceedings shall be carried out in English.

Article XVI: GENERAL CONDITIONS:

16.2 The Agreement shall be governed according to the laws of India. "

2.1 On 12.12.1997 and thereafter, NIRMA and LENTJES ENERGY (INDIA) PVT.LTD. (LEI), a wholly owned subsidiary of LURGI, entered into other agreements for engineering, supply, erection and commissioning of boilers for which technical know-how was to be given by LURGI to NIRMA under the aforementioned agreement. Differences and disputes had arisen during the operation of those subsequent agreements and arbitration proceedings were commenced in India in which parties on both sides made claims and counter-claims. During the pendency of such arbitration proceedings, on 29.1.2001, LURGI invoked arbitration under the first "Know-how and Supervision Agreement" for an award, in substance, directing NIRMA to pay DM 6,02,962 as shortfall in the contract value, DM 4,61,020 on account of extra work and DM 29,65,945 on account of escalation of costs, each with interest @ 8% per annum and costs of the arbitration proceedings. This was alleged to be a counter-blast to the arbitration commenced in India at the instance of NIRMA.

2.2 Upon the latter arbitration getting under way, the Secretariate of the ICC transmitted after hearing the parties, the signed Terms of Reference documents to the International Court of Arbitration. According to the provisional time-table, preliminary point of jurisdiction encapsulated in issues 5.1 and 5.2 of the Terms of Reference as raised by NIRMA was to be dealt with first. Those issues read as under:

"5.1 Has the Arbitral Tribunal jurisdiction ?
In answering this question, the following sub-issues should be addressed:-

5.1.1 Did a question/dispute or difference arise out of or in connection with the Know-how Agreement, that would entitle the claimants to invoke Art.15.1 ? And if so, when ?

5.1.2 Does the Tribunal have jurisdiction over the present matter notwithstanding the existence of the pending Indian arbitral proceedings ?

5.2 If the answer to Issue 5.1 above is in the affirmative, then, should the Arbitral Tribunal continue to deal with the claim and the counterclaim or otherwise treat the counterclaim as withdrawn without prejudice to any right

to raise the counterclaim at a later stage or in another forum ?"

2.3 After considering the submissions of the parties on the above issues, the Tribunal made the impugned first partial award in which the final decision was in the following terms:

"7. THE DECISION OF THE ARBITRAL TRIBUNAL:

Having carefully considered all the written and oral submissions made in respect of Issues No. 5.1 and 5.2, as defined in the Terms of Reference document in this arbitration, signed on 21st September 2001, the Arbitral Tribunal now finds, holds, determines and orders as follows:-

7.1 A "question/dispute or difference" has arisen on 17th January 2001 out of or in connection with the Know-How Agreement, which entitle the claimants to invoke Art.15.1, and the Arbitral Tribunal has jurisdiction over the present arbitral proceedings notwithstanding the existence of the pending Indian arbitral proceedings.

7.2 Notwithstanding the existence of the Indian arbitral proceedings, the Arbitral Tribunal should proceed to deal with the Claimant's claims.

7.3 All issues of costs in connection with this Partial Award are hereby reserved."

3. As seen earlier, the challenge to the above First Partial Award under Section 34 of the Act was turned down only on the ground that that award was in essence a decision on the plea that the arbitral tribunal did not have jurisdiction or was exceeding the scope of its authority and the scheme of the Act did not permit challenge to such a decision where the arbitral tribunal had not accepted the plea. Thus, the challenge to jurisdiction of the arbitral tribunal was not examined on merits and the contentions of the parties in the present appeal were also, therefore, restricted to maintainability of the application under Section 34 of the Act.

4. Mr.Dushyant Dave, the learned senior counsel appearing for NIRMA, was at pains to convince the Court

that the arbitral award sought to be challenged was for all intent and purposes a final award on a part of the subject-matter which had to be challenged immediately under Section 34 of the Act. He submitted that one of the main objectives of the Act, as stated in the Statement of Objects and Reasons as given in the Arbitration and Conciliation Bill, 1995, was to ensure that arbitral tribunal remains within the limits of its jurisdiction. He submitted that arbitral award includes an interim award by definition. He submitted that the impugned award was, by agreement of the parties and according to the ICC Rules, an award which also satisfied all the attributes enumerated in Section 31 of the Act. Section 31 expressly permits making of an interim arbitral award during the arbitral proceedings and appeal from the impugned award not being available under Section 37, recourse to a court under Section 34 was the only remedy. He pointed out that under the provisions of sub-section (3) of Section 34, an application for setting aside the award cannot be made after three months of the receipt of the award and delay even for sufficient cause would bar the remedy after a further period of 30 days. Under the provisions of Sections 35 and 36, the award would be final and binding and enforceable as a decree after the time for making an application to set it aside has expired or such application is rejected. Therefore, the challenge to the impugned award on the most vital issue, the verdict on which would cast a shadow on the entire arbitral proceeding and the subsequent awards, should be decided at this stage and it ought not to have been spurned, according to the submission.

5. Mr.J.P.Sen, learned counsel for LURGI, submitted that the impugned award rendered by the ICC Tribunal having its seat at London in the United Kingdom, which State is a party to the New York Convention, is a 'foreign award' and cannot be challenged in an Indian court by way of a petition under Section 34 of the Act; that the challenge was validly waived in view of the ICC Rules and that, in any event, the arbitral award is only a decision rejecting a jurisdictional plea and as such it is not open to challenge under Section 34 of the Act. He submitted that the English Arbitration Act, 1996 applied in all cases where the seat of arbitration was in England, and as such the appellant's remedy was under Section 67 of the English Act which provides for challenge to any award of the arbitral tribunal including an interim award deciding upon its own jurisdiction. The impugned award could have been challenged within a period of 28 days under the English Act and the appellant has not done so. He submitted that the enforcement in India

of a New York Convention award can be opposed on the grounds set out in Section 48 of the Act which are substantially similar to the grounds available to challenge a domestic award under Section 34. However, since no award has been rendered on merits, no occasion has arisen for LURGI to enforce any award in India. If and when such an occasion arises, the appellant would have an opportunity to resist enforcement of such award under Section 48 of the Act. It is repeatedly asserted in his written arguments also that a decision rejecting jurisdictional plea is not an award within the meaning of Section 34. Thus, the jurisdiction of the Indian court is called into question on the premise that the impugned award is a 'foreign award' made in a convention country and not a domestic award to which Part I of the Act applies. He submitted that if the award in question were to be treated as a domestic award, an anomalous situation would arise insofar as it would be enforceable under Section 36 on the one hand and being properly a 'foreign award' within the definition of Section 44, its enforcement could also be resisted under Section 48 even as, on the other hand, it could also be challenged in the country where it is rendered.

5.1 Elaborating his arguments, Mr.Sen submitted that, even assuming that Part I of the Act applied to the arbitration in the instant case, the parties had waived recourse against arbitral award by virtue of the provisions of sub-section (8) of Section 2 read with Art.28 (6) of the ICC Rules of Arbitration, according to which, every award shall be binding on the parties and the parties shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. And, even assuming that recourse under Section 34 was available, according to the scheme of the Act, the arbitral tribunal was required to continue with the arbitral proceedings and to make an award on merits if the jurisdictional plea was rejected. It was submitted in writing that the mere fact that the ICC arbitral tribunal has described its ruling rejecting the petitioner's jurisdictional plea as a "partial award" does not make it an "award" within the meaning of, or capable of being challenged under, Section 34. The ICC arbitral tribunal has conveniently described its ruling as a "partial award" only in view of the prevailing practice in England and the provisions of the English Arbitration Act, 1996. Under the English Act, an arbitral tribunal may render an award on jurisdiction under Section 31 which may be challenged under Section 67.

6. The learned counsel relied upon several judgments of various courts in support of the submissions to which reference will be made hereinafter. The issues which emerge at this stage can be identified and articulated as under:

(a) Whether the Indian court would have jurisdiction to entertain an application for setting aside the impugned partial award ? and

(b) Whether an application to set aside the impugned partial award was maintainable under Section 34 of the Act ?

7. Before dealing with the critical controversy created by the facts of the case and the contentions of the learned counsel, it would be advantageous to take an overview of the relevant provisions of the Act.

7.1 The Arbitration and Conciliation Act, 1996 is, by its preface, an Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. Whereas the United Nations Commission on International Trade Law (UNCITRAL) had adopted the Model Law on International Commercial Arbitration and the General Assembly of the United Nations recommended that all countries gave due consideration to the said Model Law, the Indian law was enacted after taking into account the aforesaid Model Law. According to its Statement of Objects and Reasons, the main objectives, inter alia, were: to comprehensively cover international commercial arbitration as also domestic arbitration, to ensure that the arbitral tribunal remained within the limits of its jurisdiction, to minimise the supervisory role of courts in the arbitral process as also to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a convention-country will be treated as a foreign award. The words "arbitral award" are defined to include an interim award and the term "award" is left undefined. The Act is divided into four parts of which Part I compulsorily applies where the place of arbitration is in India. However, according to sub-sections (4) and (5) of the same Section 2, Part I, subject to exceptions, applies to every arbitration under any other enactment and, subject to that and save insofar as provided otherwise by any law or any agreement in force between India and any other country, Part I applies

to all arbitrations and to all proceedings relating thereto. If an award is made under Part I, it has to be considered as a domestic award. The derogable provisions of Part I can be waived by agreement, which waiver may also be through adoption of arbitration rules by agreement. Section 5 of the Act, opening with a sweeping non-obstante clause, declares the policy that no judicial authority shall intervene, except where so provided in Part I, in matters governed by that part. Chapter II and III of Part I of the Act are related to Arbitration Agreement and the composition of arbitral tribunal. Chapter IV entitled "Jurisdiction of Arbitral Tribunals" provides in Section 16 for competence of arbitral tribunal to rule on its own jurisdiction. A plea that the arbitral tribunal does not have jurisdiction or a plea that the arbitral tribunal is exceeding the scope of its authority, has to be raised at an early opportunity and the arbitral tribunal has to decide on such a plea. Where such a plea is rejected, the arbitral tribunal is required to continue the arbitral proceedings and make an arbitral award. An express provision in sub-section (6) of Section 16 is made to afford an opportunity to challenge such award in accordance with Section 34. Under sub-section (2) of Section 19, the parties to the arbitration agreement are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings, subject to the provisions of Part I. Sub-section (6) of Section 31 allows the making of an interim arbitral award on any matter with respect to which final award could be made. Under Section 32, the arbitral proceedings shall be terminated by final arbitral award or by an order of the arbitral tribunal under sub-section (2) thereof. Section 34 provides for recourse to a court against an arbitral award only by an application for setting aside such award in accordance with sub-sections (2) and (3) thereof which provide for the grounds and the period of limitation. Sub-section (4) provides for giving an opportunity to the arbitral tribunal to eliminate the grounds for setting aside the award. According to Sections 35 and 36, the award shall be, subject to the provisions of Part I, final and binding and shall be enforced as a decree of the court. Chapter IX provides for appeals and in that no appeal is provided against a decision rejecting the plea that arbitral tribunal did not have jurisdiction or the plea that it was exceeding the scope of its authority.

7.2 Part II of the Act defines in Section 44 "Foreign Award" of which the essential attributes are that:

(a) It is an arbitral award on difference

between persons, arising out of legal relationship, whether contractual or not, considered as commercial under the law in force in India;

(b) It is made on or after the 11th day of October, 1960 in pursuance of an agreement in writing for arbitration to which the Convention set forth in the first schedule applies; and

(c) It is made in one of such territories as the Central Government may, by intimation in the Official Gazette, declare to be territories to which the said Convention applies.

Section 46 declares that the foreign award enforceable under Chapter I, Part II shall be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India and provisions relating to enforcement of such foreign award would include reliance upon such award. Section 48 enumerates the conditions for enforcement of foreign awards which practically provide the grounds for nullifying the effect of a foreign award. Section 49 provides that upon satisfaction of the Court about enforceability of a foreign award, it shall be deemed to be a decree of that court. As observed by the Supreme Court in SUNDARAM FINANCE LTD. v. NEPC INDIA LTD. [AIR 1999 SC 565], interpretation of the Act should not be based on provisions of the old Act but on Explanatory Notes and analysis of the UNCITRAL Model Law.

8. The judgment in SUMITOMO HEAVY INDUSTRIES LTD. v. O.N.G.C. LTD. [(1998) 1 SCC 305] was relied upon for the proposition that the law which would apply to the filing of the award, its enforcement and to its setting aside, would be the law governing the agreement to arbitrate and the performance of that agreement. Deciding upon the area of operation of curial law, the Supreme Court held that curial law operates during the continuance of the proceedings before the arbitrator to govern the procedure and conduct thereof. The courts administering the curial law have the authority to entertain applications by parties to arbitrations being conducted within their jurisdiction for the purpose of ensuring that the procedure that is adopted in the proceedings before the arbitrator conforms to the

requirements of the curial law and for reliefs incidental thereto. Such authority of the courts administering the curial law ceases when the proceedings before the arbitrator are concluded. The need to challenge an award arises if it is being enforced and the enforcement process is subsequent to and indpendent of the proceedings before the arbitrator. It is not governed by the curial or procedural law that governed the procedure that the arbitrator followed in the conduct of the arbitration. The proper law governing the arbitration in that case being the law of India, it was held that the courts in India were entitled to receive the awards made in United Kingdom.

8.1 In NATIONAL THERMAL POWER CORPORATION (NTPC) v. SINGER COMPANY [(1992) 3 SCC 551], it is held that where the proper law of contract is expressly chosen by the parties, as in the present case, such law must in absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract. The overriding principle is that the courts of the country whose substantive laws govern the arbitration agreement are the competent courts in respect of all matters arising under the arbitration agreement and the jurisdiction exercised by the courts of the seat of arbitration is merely concurrent and not exclusive and strictly limited to matters of procedure. All other matters in respect of the arbitration agreement fall within the exclusive competence of the courts of the country whose laws govern the arbitration agreement. It is categorically held in paragraphs 27 and 33 as under:

"27. The proper law of the contract in the present case being expressly stipulated to be the laws in force in India and the exclusive jurisdiction of the courts in Delhi in all matters arising under the contract having been specifically accepted, and the parties not having chosen expressly or by implication a law different from the India law in regard to the agreement contained in the arbitration clause, the proper law governing the arbitration agreement is indeed the law in force in India, and the competent courts of this country must necessarily have jurisdiction over all matters concerning arbitration. Neither the rules of procedure for the conduct of arbitration contractually chosen by the parties (the ICC Rules) nor the mandatory requirements of the procedure followed in the courts of the country

in which the arbitration is held can in any manner supersede the overriding jurisdiction and control of the Indian law and the Indian courts."

"33. An international commercial arbitration necessarily involves a foreign element giving rise to questions as to the choice of law and the jurisdiction of courts. Unlike in the case of persons belonging to the same legal system, contractual relationships between persons belonging to different legal systems may give rise to various private international law questions such as the identity of the applicable law and the competent forum. An award rendered in the territory of a foreign State may be regarded as a domestic award in India where it is sought to be enforced by reason of Indian law being the proper law governing the arbitration agreement in terms of which the award was made. The Foreign Awards Act, incorporating the New York Convention, leaves no room for doubt on the point."

8.2 In the context of the provisions of the old Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961, it is observed that an award is "foreign" not merely because it is made in the territory of a foreign State but because it is made in such a territory on an arbitration agreement not governed by the law of India. The Foreign Awards Act contained a specific provision to exclude its operation to what may be regarded as a "domestic award" by virtue of Section 9 which said that nothing in that Act shall apply to any award made on an arbitration agreement governed by the law of India. Such foreign awards were held to be amenable to the jurisdiction of Indian courts and controlled by the Indian system of law just as in the case of any other domestic award, except that the proceedings held abroad and leading to the award were in certain respects amenable to be controlled by the public policy and the mandatory requirements of the law of the place of arbitration and the competent courts of that place. It was concluded in the NTPC case (supra) that the jurisdiction exercisable by the English courts and the applicability of the laws of that country in procedural matters must be viewed as concurrent and consistent with the jurisdiction of the competent Indian courts and the operation of Indian laws in all matters concerning arbitration insofar as the main contract as well as that which is contained in the arbitration clause are governed by the laws of India.

8.3 The recent judgment of the three Judge Bench of the Supreme Court in BHATIA INTERNATIONAL v. BULK TRADING SA [(2002) 4 SCC 105] is rendered under the provisions of the new Arbitration and Conciliation Act, 1996 which has, while repealing, substituted the Arbitration (Protocol and Convention) Act, 1937, Arbitration Act, 1940 and Foreign Awards (Recognition and Enforcement) Act, 1961. In the facts of that case, while arbitration was held in Paris (France) as per the ICC Rules, an application under Section 9 of the Act was filed in the Court of learned Additional District Judge, Indore, M.P. (India) with a prayer for injunction and the maintainability of such application was in issue. It was contended that Section 9 fell in Part I of the Act and Part I did not apply to the arbitration being held out of India. After referring to the provisions of Sections 1 and 2, Hon'ble Justice S.N.Variava held that:

"21. ..... The legislature is emphasising that the provisions of Part I would apply to arbitrations which take place in India, but not providing that the provisions of Part I will not apply to arbitrations which take place out of India. the wording of sub-section (2) of Section 2 suggests that the intention of the legislature was to make provisions of Part I compulsorily applicable to an arbitration, including an international commercial arbitration, which takes place in India. Parties cannot, by agreement, override or exclude the non-derogable provisions of Part I in such arbitrations. By omitting to provide that Part I will not apply to international commercial arbitrations which take place outside India, the effect would be that Part I would also apply to international commercial arbitrations held out of India. But by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to allow parties to provide by agreement that Part I or any provision therein will not apply. Thus, in respect of arbitrations which take place outside India even the non-derogable provisions of Part I can be excluded. Such an agreement may be express or implied."

"23. .....An award passed in an arbitration which takes place in India would be a "domestic award". There would thus be no need to define an

award as a "domestic award" unless the intention was to cover awards which would otherwise not be covered by this definition. Strictly speaking, an award passed in an arbitration which takes place in a non-convention country would not be a "domestic award". Thus, the necessity is to define a "domestic award" as including all awards made under Part I. The definition indicates that an award made in an international commercial arbitration held in a non-convention country is also considered to be a "domestic award".

"24. Section 5 provides that a judicial authority shall not intervene except where so provided in Part I. Section 8 of the said Act permits a judicial authority before whom an action is brought in a matter to refer parties to arbitration. If the matters were to be taken before a judicial authority in India it would be a court as defined in Section 2 (1) (e). Thus, if part I was to only apply to arbitrations which take place in India, the term "court" would have been used in Sections 5 and 8 of the said Act. the legislature was aware that in international commercial arbitrations, a matter may be taken before a judicial authority outside India. As Part I was also to apply to international commercial arbitrations held outside India the term "judicial authority" has been used in Sections 5 and 8."

It is further held in para 26 and 32 that:

"26. .....To the extent that Part II provides a separate definition of an arbitral award and separate provisions for enforcement of foreign awards, the provisions in Part I dealing with these aspects will not apply to such foreign awards. It must immediately be clarified that the arbitration not having taken place in India, all or some of the provisions of Part I may also get excluded by an express or implied agreement of parties. But if not so excluded the provisions of Part I will also apply to "foreign awards". The opening words of Sections 45 and 54, which are in Part II, read "notwithstanding anything contained in Part I". Such a non obstante clause had to be put in because the provisions of Part I apply to Part.II."

"32. To conclude, we hold that the provisions

of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India, the provisions of Part I would compulsorily apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India, provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case, the laws or rules chosen by the parties would prevail. Any provision in Part I, which is contrary to or excluded by that law or rules, will not apply."

Lastly, it is also observed by Their Lordships that the Act does not appear to be a well-drafted legislation. However, proper and conjoint reading of all the provisions indicates that Part I is to apply also to international commercial arbitrations which take place out of India, unless the parties by agreement, express or implied, exclude it or any of its provisions. On such interpretation, there are no lacunae in the said Act. Such interpretation also does not leave a party remediless and the different interpretations preferred by several High Courts were held to be not good law.

9. In the instant case, there is no doubt about the fact that the arbitration in question is an international commercial arbitration and the proper law governing the arbitration is the law of India. Applying the above principles evolved in NTPC (supra) and BHATIA INTERNATIONAL (supra), not only that the provisions of the Indian Arbitration Act apply to the arbitration but the court of competent jurisdiction in India has jurisdiction to entertain applications in accordance with law. In the context of Section 34 of the Act, the above view is further fortified by the fact that it provides for recourse to a court against an "arbitral" award without deploying the words "domestic award" or "foreign award". The corresponding provision of Clause (1) of Art.34 of the UNCITRAL Model Law reads as under:

" (1) Recourse to a court against an arbitral award made in the territory of the State/ under this law may be made only by an application for setting aside in accordance with Para (2) and (3) of this Article."

Parallel provision in Section 34 of the Act omits either

of the clauses, namely, "made in the territory of the State" or "under this law". The commentary of the Commission on this aspect reveals that the question of the territorial scope of application, the pending nature of which is clear from the alternative wordings placed in para (1) was required to be considered. It was submitted that the territorial scope of Art.34 should be the same as the one of the Model Law in general, whichever may be criterion adopted by the Commission. Thus, the territorial scope of application of the Model Law was not finally decided. The Model Law did not state to which individual arbitrations of international commercial nature it would apply. Although the prevailing view of the Working Group was in favour of strict territorial criterion, the decision was not taken to expressly deal with the issue in Art.1. The question was also left undecided in the context of Art.34 as indicated by the two variants placed in Art.34. It was however felt that the question of territorial scope of application needed to be answered in respect of most of the provisions of the Model Law because certain provisions dealing with the role of the courts in respect of recognition of arbitration agreements and recognition and enforcement of awards, were intended to cover arbitration agreements or awards without regard to the place of arbitration or any choice of procedural law. The Indian Act having been enacted after taking into account the Model Law and the Rules, the omission of either of the above alternative clauses in Art.34 indicates a conscious choice and decision to allow recourse to a court against any award, whether made in the territory of India or made under the Act. There is no dispute that, on such interpretation, the District Court at Bhavnagar would have the jurisdiction to entertain an application under Section 34 for setting aside the award.

9.1 According to the principle stated by Lord Denning M.R. in INTERNATIONAL TANK AND PIPE SAK v. KUWAIT AVIATION FUELLING CO KSC [(1975) 1 All ER CA], if the parties had agreed that the proper law of the contract should be the law in force in India, but had also provided for arbitration in a foreign country, the laws of India would undoubtedly govern the validity, interpretation and effect of all clauses, including the arbitration clause in the contract as well as the scope of the arbitrators' jurisdiction. It is Indian law which governs the contract, including the arbitration clause, although in certain respects regarding the conduct of the arbitration proceedings, the foreign procedural law and the competent courts of that country may have a certain measure of control.

9.2 The Supreme Court has also observed in NTPC case (supra) that the arbitration clause must be considered together with the rest of the contract and the relevant surrounding circumstances. In that case, the choice of the place of arbitration was, as far as the parties were concerned, merely accidental. On the other hand, apart from the expressly stated intention of the parties, the contract itself, including the arbitration agreement contained in one of its clauses, was redolent of India and matters Indian. The disputes between the parties under the contract had no connection with anything English, and they had the closest connection with Indian laws, rules and regulations. In those circumstances, the mere fact that the venue chosen by the ICC Court for the conduct of arbitration was London did not support the case of SINGER on the point. Any attempt to exclude the jurisdiction of the competent courts and the laws enforceable in India was held to be totally inconsistent with the agreement between the parties.

10. In view of the above, we have no hesitation in holding that the Indian court was the court of competent jurisdiction to entertain an application under Section 34 for setting aside the award, subject to the other provisions of Part I of the Act. The argument of the learned counsel Mr.Sen for the respondent that the challenge and recourse to the court against the impugned award stood waived on account of it being the product of an "international commercial arbitration" could not appeal to us. His submission was that, when the parties agreed to settle the disputes by arbitration in accordance with the rules of arbitration of the ICC, all the ICC Rules applied including Art.28 (6) which provides that every award shall be binding on the parties and the parties shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made. He relied upon the observations in BHATIA INTERNATIONAL (supra) to the effect that, in case of international commercial arbitration, the parties may waive applicability of any part of the provisions of Part I including non-derogable provisions which otherwise cannot be waived by the parties to a domestic arbitration. However, we have already held that the Act including Part I is applicable to the arbitration in question and as a logical corollary, the award made in such arbitration would be under Part I and can be considered as a domestic award as discussed in BHATIA INTERNATIONAL's case (supra). The decisive factor for an award to be considered a "domestic award" is not the place where it is made but rather the fact of it being

made under Part I of the Act. The parties in the instant case having agreed that the agreement (including the arbitration thereunder) shall be governed according to the laws of India, the arbitral award has to be held to have been made under Part I and has to be considered as a domestic award, though made on foreign soil according to the ICC Rules and Procedure - which can only displace the derogable provisions of Part I. Therefore, the recourse to a court under Section 34, it not being a derogable provision, cannot be said to have been waived by subscribing to the ICC Rules of Arbitration.

11. The first issue having been decided in favour of the appellant, we have to consider the submissions on the second issue regarding maintainability of the application under Section 34 of the Act. It is true, as was vehemently emphasised by the learned counsel Mr.Dave, that the impugned partial award is an award finally putting to rest the jurisdictional controversy in the arbitration and it was regarded as such by the ICC Rules, the arbitral tribunal and the English Law. It also has all the trappings of an award as are attributed to an award under Section 31 of the Act and an interim award is expressly and specifically included in the definition of "arbitral award" in Section 2 (1) (c). However, the term "award" is not defined in the Act. Its dictionary meaning indicates it to be "a decision of an arbitrator on an issue submitted to him."

11.1 The analytical Commentary on UNCITRAL Draft Model Law is as under:

> "3. Art.34 provides recourse to an arbitral award without specifying which kind of decision would be subject to such recourse. The Working Group, therefore, agree that it was desirable for the Model Law to define the term "award" and noted that such definition had important implications for a number of provisions of the Model Law especially Arts. 34 and 16. After consideration of proposed definition, the Working Group decided, for lack of time, not to include a definition in the Model Law to be adopted by it and to invite the Commission to consider the matter."

13. Considering the relevant express provisions and the underlying scheme and object of the Act, we are not inclined to mechanically accept the literal interpretation given in Section 2 (1) (c). Even that provision opens with the clause "In this Part, unless the

context otherwise requires". Therefore, if the context otherwise requires, the meaning of the award can be moulded to achieve harmonious construction of the relevant provision.

13.1 The scheme of Sections 16 and 37 is such that the arbitral tribunal is empowered to rule on its own jurisdiction. A plea that the arbitral tribunal does not have jurisdiction or a plea that the arbitral tribunal is exceeding the scope of its authority, has to be decided by the arbitral tribunal and, if it takes a decision rejecting that plea, it is duty-bound to continue with the arbitral proceedings and make an arbitral award. And, the party aggrieved by such an arbitral award is permitted to make an application for setting aside the arbitral award in accordance with Section 34. Therefore, obviously, recourse is provided for challenging "such an award" which is made after the decision rejecting the plea regarding lack of jurisdiction or about arbitrators exceeding the scope of authority. The decision rejecting any of those pleas and the award made thereafter are clearly distinguishable and by no stretch can be considered to be synonymous for the purpose of Section 16. If the plea regarding jurisdiction or exceeding the scope of authority were accepted, an appeal from such a decision is expressly provided in sub-section (2) of Section 37 where it is called "an order of the arbitral tribunal". Thus, the legislature has consciously and clearly considered the decision on jurisdictional aspect to be not an "award" but an "order" or a "decision". Similarly, even after taking into account the different provision in the UNCITRAL Model Law, the legislature has omitted to provide for an appeal from such decision. On the other hand, the award as distinguished from an order or a decision on jurisdiction or arbitrability is expressly permitted to be challenged in accordance with the provisions of Section 34. Therefore, a plea cannot be set up that such decision under sub-section (5) of Section 16 would become final, binding and enforceable under Sections 35 and 36 of the Act.

13.2 In applying the above legislative scheme, the court cannot go by the form leaving alone the substance. In view of the qualified definition of arbitral award, since the context otherwise requires, the award shall not include an interim award which, in substance, is a decision of the arbitral tribunal rejecting the plea raised under sub-section (2) or (3) of Section 16.

14. Learned counsel Mr.Sen insisted that the impugned award was a foreign award and since it had not come for

enforcement before any court, there was no occasion to challenge the same. The fallacy of that argument should be obvious if the provisions of Section 46 were referred. According to Section 46, a foreign award which would be enforceable has to be treated as binding for all purposes on the persons as between whom it was made and may be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India. By virtue of the provisions of Section 49, the award which is enforceable, which means the award which is binding under Section 46, shall be deemed to be a decree of the court. Such interpretation and argument only supports and justifies the stand of the appellant that the impugned award was immediately required to be challenged for the purpose of being set aside. However, in view of the above discussion, we hold that the decision contained in the impugned award may be challenged while taking recourse to a court against the arbitral award made upon continuation with the arbitral proceedings after the aforesaid decision.

14.1 The Bombay High Court in KAPAL R. MEHRA v. BHUPENDRA M. BHEDA [1998 (4) Bom. C.R. 872] has taken a similar view.

The constitutional validity of the Act was under challenge in BABAR ALI v. UNION OF INDIA [(2000) 2 SCC 178], wherein it was turned down with the observations that only because the question of jurisdiction of the arbitrator was required to be considered after the award was passed and not at any penultimate stage by the appropriate court, it could not be a ground for submitting that such an order was not subject to any judicial scrutiny. The time and manner of judicial scrutiny can legitimately be laid down by the Act.

14.2 The Delhi High Court has also, in UNION OF INDIA v. EAST COAST BOAT BUILDERS & ENGINEERS LTD. [AIR 1999 Del. 44], taken the view that the provisions of Section 37 appear to have been consciously enacted not to provide relief to the aggrieved party at that stage of the arbitral proceedings where the arbitral tribunal decides the issue of jurisdiction in its favour. The provision is made in that manner only to minimise the supervisory role of the courts in arbitral process at that stage. Relying upon the following observation in UTTAM SINGH DUGAL & CO. LTD. v. HINDUSTAN STEEL LTD. [AIR 1982 MP 206], it was held that an order in the nature of the impugned order could not be termed as an interim award.

" Before an order of the arbitrators may be held

to be an interim order, it must decide any part of the claim or any issue of law. What the arbitrators did in this case was to decide the preliminary issue relating to their jurisdiction. As the order of the arbitrators does not decide any part of the claim or any issue of law, it cannot be held to be an interim award."

14.3 While turning down the challenge to constitutional validity of the aforesaid relevant provisions of the Act, the Andhra Pradesh High Court has, in M. MOHAN REDDY v. UNION OF INDIA [2000 (1) Arb. L.R. 30 (A.P.)], observed that:

"6. .....As already stated above, Central Act 26 of 1996 has aimed at consolidating the law of arbitration, both domestic and foreign and to cut short the procedural aspects for providing speedy and efficacious remedy and not providing of appeal against ruling of the Arbitrator upholding his competence to deal with the matter is one such step in aid of faster disposal of the arbitral proceedings, and by giving opportunity to the party aggrieved to question the award under Section 34 of the Act. The only thing is that the party has to wait till the award is rendered and is not given that traditional right of interrupting the proceedings at each stage of the proceeding. As such, there is a nexus for the object to be achieved, i.e. speedy disposal of the arbitration proceedings and also the intelligible differentia as already mentioned supra."

Accordingly, we decide the second issue against the appellant.

15. It was also observed during the course of arguments that the parties on both sides had taken contradictory stands and unloaded so much voluminous printed and typewritten material that could only create confusion and cause delay. The learned counsel for the appellant relied upon Section 34 for justifying the recourse on the one hand and relied upon the definition and the provisions of the English Act and the ICC Rules on the other hand to wriggle out of the scheme of Section 16 read with Section 37. The learned counsel for the respondents insisted that the impugned award was an award but could not be challenged under Section 34 on account of being a foreign award which, by necessary implication, could have been challenged under Section 48 of the Act.

Thus, the pleas propelled by the parties appear more polemical than pragmatic. The record and relevant papers, including judgments, running into more than 2500 pages appear to have consumed at the admission stage considerable time of another Bench which, after hearing spread over several months, had to grant interim order against the pending arbitral proceedings on 14.10.2002. It appears that that order was carried in appeal and an application by the respondents was made in this Court with a prayer to dispose of this appeal before 30.11.2002 in view of the request made in the order of the Honourable Supreme Court. Under such circumstances, the Bench of this Court (Coram: J.N.Bhatt & J.R.Vora, JJ) hearing the matter was constrained to make the following order :

> ".....Despite our sincere efforts and even by giving, out-of-turn priority, to this part-heard matter which has 8 big volumes having nearly 300 to 400 pages in each one, over and above two voluminous dockets, constituting Special Bench by the Hon'ble Chief Justice, the submission of such an application, manifests in all probability, if not unpleasant, a song of hidden sentiments and invisible for some acrimony and it is in this context, both of us, deliberated upon, and after close scrutiny that it is incumbent, and not expedient only to refer to the Hon'ble Chief Justice for passing appropriate order for the special assignment to any other Division Bench, since this matter is, now, not to be treated as part-heard, and not to be placed before us....."

Although the learned counsel fully cooperated in finishing the entire final hearing within three days before this Bench to which the matter was assigned, as also in concentrating only on the relevant contentions and material, we note with regret the consumption of considerable time of two Benches of this Court by referring to the voluminous record unnecessarily unloaded in the court which would necessarily result into relegation of all other urgent and important matters, not to mention the matters awaiting final hearing since decades. This epilogue is essential and of some instructive value inasmuch as it has a bearing upon the strength and burden of judiciary, ethics of advocacy and the alacrity of the legislature in making clarificatory amendments which can go a long way in eliminating unnecessary and arduous litigations. We also note the sincere efforts made by the learned counsel in minimising the area of difference for an over-all out-of-Court and

out-of-arbitration settlement which, at one stage, appeared feasible and within reach but which course could not be fully pursued in the Court for want of time.

The appeal is dismissed with the above observations with no order as to costs. The Civil Applications filed in this appeal are also accordingly rejected and the interim relief stands vacated.

At this stage, the learned counsel for the appellant requested to extend the interim relief which was operating till now. In view of rejection of the appeal, we are not inclined to accept the request and accordingly that prayer is also rejected.

Sd/-
(K.R.Vyas, J.)

Sd/-
(D.H.Waghela, J.)
(KMG Thilake)